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THE CONSTITUTIONAL RIGHT TO PRIVACY AND THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS LIMITATIONS ON THE NATIONAL TRANSPORTATION SAFETY BOARD'S RIGHT TO INVESTIGATE AIR TRAFFIC ACCIDENTS

TERRY D. RAGSDALE

I. INTRODUCTION

THE AIR FORCE parajumper team aboard an HC-130 rescue plane had been following the flight of the single-engine Cessna 210 Centurion for well over an hour.¹ The rescue plane was part of a military convoy that had been scrambled to intercept the Cessna after the plane's pilot had radioed the Federal Aviation Administration (FAA) in Virginia, complaining of chest pains and difficulty in breathing.² Since the Air Force had been unable to establish radio contact with the apparently unconscious pilot for over four hours, the parajumper/medic team was not surprised to see the Cessna eventually run out of gas and begin to spiral sharply toward the Atlantic Ocean near the Bahamian island of Eleuthera. The team *was* surprised, however, to see the pilot escape from the rapidly sinking plane.³ Dropping a raft, the medics parachuted into the ocean and rescued the pilot, who had suffered a piercing abdominal wound.⁴ Fascinating media reports

¹ James S. Kunen, et al., *Flying Straight into Trouble*, PEOPLE WKLY., July 31, 1989, at 20, 21; George J. Church & Bruce Henderson, *A Bizarre and Suspicious Flight*, TIME, July 24, 1989, at 21.

² Church, *supra* note 1, at 21.

³ *Id.*

⁴ Kunen, *supra* note 1, at 21.

exposed the nation to the gripping saga of Thomas L. Root, the "mystery" pilot.

At Memorial Hospital in Hollywood, Florida, surgeons discovered that Root's abdominal wound had been caused by a bullet.⁵ Media reports soon revealed that Root, a Washington, D.C. communications attorney, was under numerous criminal investigations,⁶ and many speculated that Root's mystery flight was, in fact, a failed suicide attempt.⁷ After a psychiatrist interviewed Root at Memorial Hospital, Root publicly denied the allegations of suicide and suggested that a revolver in the cockpit must have accidentally discharged when the plane crashed.⁸

During its investigation of the airplane accident, the National Transportation Safety Board (NTSB) issued a subpoena to the Hollywood Memorial Hospital seeking Root's medical records.⁹ The hospital complied with the request, except as to Root's psychiatric records.¹⁰ The NTSB sought enforcement of the subpoena in federal district court and moved for judgment on the pleadings.¹¹ In response, Root intervened and moved for judgment on the pleadings and to quash the subpoena on the grounds that the psychiatric records were protected by a psychotherapist-patient privilege or the constitutional right to privacy.¹² Apparently holding that the psychiatric-patient communications were worthy of protection under either a federal common law privilege or the constitutional right to privacy, the district court granted Root's motion to

⁵ *Id.*

⁶ *Id.* at 22. Several states were investigating Root for securities fraud, and the U.S. Customs Service was investigating Root for possible drug running. *Id.*

⁷ *Id.* at 21. Hollywood Police Chief Richard Witt stated that "[p]owder burns indicate that this was a contact wound The gun was either held against or very close to the body." *Id.*

⁸ *Sequels*, PEOPLE WKLY., December 25, 1989, at 111, 112; Kunen, *supra* note 1, at 21.

⁹ NTSB v. Hollywood Memorial Hosp., 735 F. Supp. 423, 423 (S.D. Fla. 1990), *appeal dismissed*, 933 F.2d 1021 (11th Cir. 1991).

¹⁰ 735 F. Supp. at 423.

¹¹ *Id.*

¹² *Id.*

quash the subpoena.¹³

*National Transportation Safety Board v. Hollywood Memorial Hospital*¹⁴ raises two uniquely important questions: (1) whether under federal common law a psychotherapist-patient privilege insulates a pilot's post-crash psychotherapy records from the NTSB's access to data needed to determine probable cause of an air accident and, (2) assuming that a psychotherapist-patient privilege does not exist, whether a constitutional right to privacy nevertheless protects such communications.

This comment attempts to answer these questions first by reviewing the NTSB's right to investigate air accidents from a historical perspective. Discussion then turns to current limitations on the NTSB's right to investigate air accidents, which ostensibly include statutory limitations, the psychotherapist-patient privilege, and the constitutional right to privacy.¹⁵

¹³ *Id.* at 424-25. Post-crash, Root's once soaring career has mirrored his fateful flight. News reports revealed Root's association with Georgia-based Sonrise Management Services, organizer of more than 160 partnerships, most of which Root represented in their licensing applications for Christian radio stations. *Jury Indicts Thomas Root for Fraud*, 118 BROADCASTING, March 26, 1990, at 42; Kunen, *supra* note 1, at 21. Even though Sonrise took in approximately \$14 million in four years, Root admitted that Sonrise had won less than five licenses for its clients. Kunen, *supra* note 1, at 21. On June 5, 1990, Root pleaded guilty to five federal counts of forgery and fraud arising from his representation of clients before the Federal Communications Commission. As a result of the plea, Root faced a maximum fine of \$1.25 million and a maximum sentence of thirty-five years. David Johnston, *Lawyer in Plane Crash Pleads Guilty to Forgery*, N.Y. TIMES, June 6, 1990, at A16. The day before pleading guilty to the federal counts, Root and others had been indicted by a North Carolina county grand jury with 2,695 counts of securities fraud, deceptive trade practices, and conspiracy to commit fraud. *Id.* If convicted, Root could face more than 1500 years of imprisonment. *Id.* On the same day, the United States Supreme Court set into motion disbarment proceedings against Root. *In re Disbarment of Thomas Lawrence Root*, 110 S. Ct. 2582 (1990).

¹⁴ 735 F. Supp. 423 (S.D. Fla. 1990).

¹⁵ This comment does not purport to address every conceivable limitation on the National Transportation Safety Board's right to investigate air accidents. As the title suggests, the scope of this comment is restricted primarily to the psychotherapist-patient privilege and the constitutional right to privacy.

II. NTSB'S RIGHT TO INVESTIGATE AIR ACCIDENTS

The right of the National Transportation Safety Board to investigate air accidents traces its roots as far back as the notorious air crash that took the lives of Oklahoma humorist Will Rogers and aviation pioneer Wiley Post in 1935.¹⁶ After briefly tracing the history of the federal government's involvement in air accident investigation, existing statutes authorizing the NTSB's investigatory powers are examined.

A. History of Civil Aviation Accident Investigation Process¹⁷

The Air Commerce Act of 1926¹⁸ constituted the first federal civil aviation law in the United States.¹⁹ The Act authorized the Secretary of Air Commerce, under the Secretary of Commerce, to "investigate, record and make public the causes of accidents in civil air navigation."²⁰ Modifications to the Air Commerce Act in the mid-1930's resulted in enhanced investigatory powers, including authorization to subpoena witnesses²¹ and creation of an accident investigation panel.²²

¹⁶ C.O. Miller, *Aviation Accident Investigation: Functional and Legal Perspectives*, 46 J. AIR L. & COM. 237, 239 (1981). Mr. Miller formerly served as the Director of the Bureau of Aviation Safety under the National Transportation Safety Board. *Id.* at 237.

¹⁷ See generally *id.* (comprehensive history of legislation bearing upon aviation accident investigation).

¹⁸ Pub. L. No. 69-254, 44 Stat. 568 (1926) (repealed 1958).

¹⁹ Miller, *supra* note 16, at 238.

²⁰ Pub. L. No. 69-254 § 2(e), 44 Stat. 568, 569 (1926) (repealed 1938).

²¹ Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926), amended by Pub. L. No. 73-418, 48 Stat. 1113 (1934) (repealed 1938). Miller summarized the amendments as follows:

The Secretary of Commerce was specifically authorized to hold public hearings to inquire into the facts and circumstances surrounding aircraft accidents, to subpoena and to examine witnesses and documents, and to make public statements regarding the causes of the accidents. The amendments to the Act also prohibited use of the Secretary's reports in any suit or action arising from any accident.

Miller, *supra* note 16, at 239 (footnotes omitted).

²² Civil Air Regulations, 14 C.F.R. § 91.0-37 (1939). See also Roy T. Atwood, Comment, *Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation*, 53 J. AIR L. & COM. 469, 471 (1987). Creation of the five-member accident investigation board within the Department of Commerce coincided with pro-

Overhauls in federal civil aviation law have often been precipitated by high profile air accidents. The Civil Aeronautics Act of 1938,²³ enacted subsequent to the separate 1935 plane crashes that took the lives of Rogers and Post as well as Senator Bronson M. Cutting of New Mexico, exemplifies this fact.²⁴ In addition to partially repealing the Air Commerce Act and creating the Civil Aeronautics Authority, the Civil Aeronautics Act of 1938 created an independent Air Safety Board charged with the functions of investigating air accidents to determine probable cause and making recommendations to prevent future accidents.²⁵ The weakness of the Air Safety Board quickly became apparent: the Board had no power to implement safety rules based upon its recommendations.²⁶ Thus, by 1940, two separate agencies had been created, the Civil Aeronautics Board (CAB) and the Civil Aeronautics Administration (CAA).²⁷ The investigatory powers of the abolished Air Safety Board were assigned to the Bureau of Safety within an independent CAB.²⁸ This scheme functioned until 1958.²⁹

After World War II, aviation burgeoned in the United States. Two major accidents in 1958, each involving military and civil aircraft,³⁰ mobilized public and Congressional attention and resulted in the Federal Aviation Act

mulgation of "administrative regulations establishing procedures for aviation accident investigation." Miller, *supra* note 16, at 239.

²³ Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938) (repealed 1958).

²⁴ Miller, *supra* note 16, at 239-40.

²⁵ *Id.* at 240.

²⁶ *Id.* at 241.

²⁷ Atwood, *supra* note 22, at 472.

²⁸ Miller, *supra* note 16, at 241. The CAB also assumed the civil aviation rule-making function. *Id.* at 241-42.

²⁹ *Id.* at 242.

³⁰ *Id.* at 243.

[O]n April 21, 1958, a United States Air Force F100 collided with a United Airlines DC-7 near Las Vegas, Nevada, killing the two military pilots and forty-seven persons aboard the transport. A month later a National Guard T33 collided with a Capital Airline Viscount outside Washington, D.C., killing eleven occupants of the Viscount.

Id.

of 1958.³¹ The 1958 Act, *inter alia*, assigned investigatory powers to the CAB to determine the probable cause of air accidents,³² while retaining a prohibition against admitting CAB reports as evidence in civil actions.³³

The next organizational shift in the area of civil aviation accident investigation was a consequence of the Department of Transportation (DOT) Act of 1966.³⁴ The 1966 Act, a congressional response to an ever growing airline industry, placed investigation of aviation accidents within the domain of the Bureau of Aviation Safety (BAS) under the newly created National Transportation Safety Board (NTSB).³⁵

Conflicts between the DOT, the FAA, and the NTSB culminated in the Independent Safety Board Act of 1974.³⁶ The 1974 Act completely reorganized the NTSB, including replacement of the Bureau of Aviation Safety with the Aviation Accident Division.³⁷ The major substantive change of the 1974 Act established the NTSB as an independent agency, completely separate from the DOT and the FAA.³⁸ Section 1441(a) of the Act broadly delineated the NTSB's responsibilities, which included the promulgation of rules and regulations attendant to accident

³¹ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. app. § 1301 (1988)).

³² *Id.* § 701; Atwood, *supra* note 22, at 472. To facilitate performance of its exclusive responsibility to issue rules and regulations regarding air safety and air accident investigation, the CAB was authorized to solicit assistance from the FAA and other governmental agencies. Miller, *supra* note 16, at 244. In contrast, the CAB steadfastly retained its task of determining the probable cause of *all* accidents, even when the investigation had been delegated to the FAA. *Id.*

³³ Atwood, *supra* note 22, at 473-74. Congress apparently included the prohibition against admission of CAB reports into evidence in suits arising out of the accident "to insure that CAB reports would not supplant the role of judge and jury in determining the cause of accidents and encourage accurate and unencumbered investigation." *Id.*

³⁴ Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931 (1966) (substantially repealed 1983).

³⁵ Atwood, *supra* note 22, at 485.

³⁶ Independent Safety Board Act of 1974, Pub. L. No. 93-633, 88 Stat. 2167 (1975) (codified as amended at 49 U.S.C. app. §§ 1901-1907 (1988)).

³⁷ Miller, *supra* note 16, at 248.

³⁸ Atwood, *supra* note 22, at 485.

reporting, investigation of accidents, and recommendation of steps to prevent similar accidents.³⁹ The 1974 Act, which retained the prohibition against use of NTSB reports as evidence in civil suits,⁴⁰ comprised the last major piece of legislation impacting on civil aviation accident investigation.

B. NTSB — Current Regulatory Framework

Regulations promulgated by the NTSB have been codified in Chapter VIII of Title 49 of the Code of Federal

³⁹ 49 U.S.C. app. § 1441(a) (1988). The subsection states:

It shall be the duty of the National Transportation Safety Board to

(1) Make rules and regulations governing notification and report of accidents involving civil aircraft;

(2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such recommendations to the Secretary of Transportation as, in its opinion, will tend to prevent similar accidents in the future;

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and

(5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents.

Id.

⁴⁰ 49 U.S.C. app. § 1441(e) (1988). The subsection states that “[n]o part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.” *Id.* See *Berguido v. Eastern Air Lines*, 317 F.2d 628, 631-32 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963). In *Berguido* the court stated:

The fundamental policy underlying 1441(e) appears to be a compromise between the interests of those who would adopt a policy of absolute privilege in order to secure full and frank disclosure as to the probable cause and thus help prevent future accidents and the countervailing policy of making available all accident information to litigants in a civil suit.

Id. See generally *Atwood*, *supra* note 22 (discussing regulatory and case law gloss on section 1441(e) and the distinction between factual and opinion material in NTSB reports); Mark Dombroff & Cecile Hatfield, *Documentation for Aircraft Accident Litigation*, TRIAL, Aug. 1984, at 70-74 (detailing how and where to obtain NTSB and FAA accident reports). *Cf. Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982) (affirming trial court's exclusion of conclusory sections of the NTSB report).

Regulations (NTSB regulations), of which part 800 describes the organization and functions of the NTSB and permissible delegations of its authority.⁴¹ According to section 800.3, the NTSB's primary function is to promote transportation safety.⁴² Section 800.2 vests the NTSB's investigatory powers in the Bureau of Accident Investigation.⁴³ Finally, section 800.27 delegates authority to designated NTSB employees to issue subpoenas and take depositions in connection with transportation accident investigations.⁴⁴

Part 831 of the NTSB regulations details the NTSB's accident investigation procedures. Section 831.2 relates the NTSB's responsibility to organize, conduct, and control "all accident investigations involving civil aircraft."⁴⁵ The nature of the NTSB's accident investigations are described in section 831.4, which, in keeping with the primary function of promoting safety, requires the NTSB to

⁴¹ 49 C.F.R. §§ 800.1-.28 (1990).

⁴² *Id.* § 800.3(a).

⁴³ *Id.* § 800.2(e). The subsection states:

(e) The Bureau of Accident Investigation, which conducts investigations of all major transportation accidents . . . within the Board's jurisdiction; recommends to the Board whether a public hearing or deposition proceeding should be held to determine the facts, conditions, and circumstances of major accidents; prepares a report for release to the public regarding such accidents for submission to the Board including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents where delegated authority to do so by the Board; initiates safety recommendations to prevent future transportation accidents

Id.; see also *Id.* § 800.25 (delegation of authority to the Director, Bureau of Accident Investigation).

⁴⁴ *Id.* § 800.27. The regulation states:

The Board hereby delegates to any officer or employee of the Board who is designated by the Chairman of the Safety Board the authority to sign and issue subpoenas, and administer oaths and affirmations, and to take depositions or cause them to be taken in connection with the investigation of transportation accidents.

Id.

⁴⁵ *Id.* § 831.2(a)(1) (emphasis added). Although the NTSB can delegate certain aviation field investigations to the Federal Aviation Administration pursuant to a request to the Department of Transportation (DOT), the National Transportation Safety Board retains *sole* responsibility for determining probable cause of the accidents. *Id.* § 831.2(a)(2).

investigate accidents with a view toward "ascertain[ing] measures which will best tend to prevent similar accidents or incidents in the future."⁴⁶ Section 831.8 states that the "investigator-in-charge" has responsibility for onsite investigation of accidents.⁴⁷ Section 831.9, among other powers, grants authority to NTSB representatives to enter crash sites, secure relevant records (including medical files and hospital records), and interrogate anyone having information relating to the accident.⁴⁸

III. EXEMPTIONS FROM PUBLIC DISCLOSURE OF THE NTSB'S REPORTS

Subsequent to the enactment of the Freedom of Information Act⁴⁹ and pursuant to the NTSB's enabling statutes,⁵⁰ reports prepared by or for the NTSB are generally

⁴⁶ *Id.* § 831.4. The regulation goes on to say that accident investigations are factual, not legal, in nature and are "not conducted for the purpose of determining the rights or liabilities of any person." *Id.* As one commentary stated, "[a] central purpose of the NTSB Report is to provide statistical data for safety evaluation and not to determine where fault lies for the purpose of litigation." Dombroff & Hatfield, *supra* note 40, at 71.

⁴⁷ 49 C.F.R. § 831.8 (1990).

⁴⁸ *Id.* § 831.9. The regulation, in part, states:

(a) *General.* Any employee of the Board, upon presenting appropriate credentials is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things necessary for proper investigation. Upon demand . . . any Government agency, or person having possession or control of . . . any pertinent records and memoranda, including all documents, papers, medical files, hospital records, and correspondence now or hereafter existing and kept or required to be kept, shall forthwith permit inspection, photographing, or copying thereof . . . for the purpose of investigating an aircraft accident/incident Authorized representatives of the Board may interrogate any person having knowledge relevant to an aircraft accident/incident

Id.

⁴⁹ 5 U.S.C. § 552 (1988).

⁵⁰ 49 U.S.C. app. § 1903 (1988). In particular, the NTSB shall "report in writing on the facts, conditions, and circumstances of each accident investigated . . . and cause such reports to be made available to the public at reasonable cost." *Id.* § 1903(a)(2). Annually, the NTSB must compile a statistical summary of transportation accidents investigated during the preceding year. *Id.* § 1904. Section 1905, which covers general public access to information, states:

(a) *General*

Copies of any communication, document, investigation, or other

available for perusal by the public. Part 801 of the NTSB regulations contains regulations concerning public availability of information.⁵¹ Part 801 implements the Freedom of Information Act⁵² and explicitly states that NTSB policy is "to make information available to the public to the greatest extent possible."⁵³ Factual reports following field investigation of accidents are made available for public inspection, normally sixty days after the accident, and reports containing determinations of probable cause are normally available within six months of the accident.⁵⁴

The above statutes and regulations demonstrate that absent a statutory exemption or an exemption otherwise provided by law, NTSB reports are available to the public. The remainder of this section briefly examines statutory exemptions to public disclosure, while the subsequent sections analyze whether the psychotherapist-patient privilege and the constitutional right to privacy preclude the NTSB from even discovering certain types of information.⁵⁵

The primary statutory exemptions are contained within the Freedom of Information Act⁵⁶ and the Privacy Act of

report, or information received or sent by the Board . . . shall be made available to the public upon identifiable request, and at reasonable cost Nothing contained in this section shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 [Freedom of Information Act], or which is otherwise protected by law from disclosure to the public.

Id. § 1905.

⁵¹ 49 C.F.R. §§ 801.1-.59 (1990).

⁵² 5 U.S.C. § 552 (1988).

⁵³ 49 C.F.R. § 801.2 (1990). "[A]ll records of the Board, except those that the Board specifically determines must not be disclosed . . . for the protection of private rights . . . are declared to be available for public inspection and copying, as provided in this part." *Id.*

⁵⁴ *Id.* §§ 801.30, 801.35.

⁵⁵ It is important to note the distinction between information that, although used by the NTSB to help make its determination of probable cause, cannot be disclosed publicly because it falls within an exemption and information that the NTSB is precluded from even obtaining. Information may potentially fall within either category. For example, a pilot might assert his constitutional right to privacy to prevent the NTSB from obtaining certain information or from releasing certain information.

⁵⁶ 5 U.S.C. § 552 (1988).

1974.⁵⁷ Subsection (b) of the Freedom of Information Act contains explicit exemptions from public disclosure⁵⁸ which have been expressly incorporated into the NTSB regulations.⁵⁹ The regulations include exemptions for internal personnel rules and practices of the NTSB,⁶⁰ for unwarranted invasion of personal privacy, and for records compiled for law enforcement purposes. Part 802⁶¹ of the NTSB regulations contains rules implementing the Privacy Act of 1974.⁶² Part 802, however, which restricts the availability of NTSB records maintained on any individual on personal privacy grounds,⁶³ apparently is a seldom-used rule.⁶⁴ A person desiring the NTSB to withhold information contained in a report from public disclosure must make written objection to the NTSB, stating the grounds for the objection.⁶⁵

⁵⁷ 5 U.S.C. § 552a (1988).

⁵⁸ 5 U.S.C. § 552(b) (1988). The statute lists the exemptions [pertinent to this comment] as follows:

(b) This section does not apply to matters that are —

....

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

....

Id.

⁵⁹ 49 C.F.R. §§ 801.50-.59 (1990) (Subpart F of Part 801).

⁶⁰ See, e.g., *In re Air Crash at Dallas/Fort Worth Airport on August 2, 1985*, 117 F.R.D. 392, 394 (N.D. Tex. 1987) (holding the NTSB's pre-decisional analytical documents to be exempt from public disclosure under 49 C.F.R. § 801.54).

⁶¹ 49 C.F.R. §§ 802.1-.20 (1990).

⁶² 5 U.S.C. § 552a (1988).

⁶³ 49 C.F.R. § 802.1 (1990). "NTSB policy encompasses the safeguarding of individual privacy from any misuse of Federal records and the provision of access to individuals to NTSB records concerning them, except where such access is in conflict with the Freedom of Information Act, or other statute." *Id.*

⁶⁴ Miller, *supra* note 16, at 256 (stating in 1981, that the NTSB regulations concerning the Privacy Act of 1974 had never been exercised).

⁶⁵ 49 C.F.R. § 831.6 (1990).

IV. LIMITATIONS UPON THE NTSB'S INVESTIGATORY POWERS

Whereas the previous section examined statutory exemptions from public disclosure of information gathered by the NTSB, this section focuses on extrinsic limitations upon the NTSB's investigatory powers. That is, with a view toward the NTSB's desire to obtain a pilot's post-crash psychotherapeutic records, what limitations exist that preclude the NTSB from obtaining such information? After briefly examining the requirements for enforcement of an administrative subpoena, the remainder of this section will probe the psychotherapist-patient privilege and the constitutional right to privacy as possible limitations upon the NTSB's investigatory powers.

A. *Enforcement of an Administrative Subpoena*

As mentioned above, the NTSB regulations empower NTSB representatives to issue subpoenas, administer oaths, and take depositions in connection with aviation accident investigations.⁶⁶ The power to issue an administrative subpoena is especially relevant in the context of this paper, since the NTSB would likely have to issue a subpoena to compel production of a pilot's psychotherapy records.⁶⁷ In *United States v. Morton Salt Co.*,⁶⁸ the United States Supreme Court set up a three part test to determine whether an administrative subpoena may be enforced in a district court: (1) whether the inquiry falls within the scope of the agency's power; (2) whether the demand is sufficiently definite; and (3) whether the information solicited is reasonably relevant to the authorized inquiry.⁶⁹ The *Morton Salt* test certainly presents a threshold limitation upon the right of the NTSB to issue administrative subpoenas. In *Morton Salt* and other cases,

⁶⁶ 49 C.F.R. § 800.27 (1990).

⁶⁷ See, e.g., *NTSB v. Hollywood Memorial Hosp.*, 735 F. Supp. 423 (S.D. Fla. 1990) *appeal dismissed*, 933 F.2d 1021 (11th Cir. 1991).

⁶⁸ 338 U.S. 632 (1950).

⁶⁹ *Id.* at 652.

however, this test has been liberally applied by courts in order to facilitate administrative agencies' performance of their congressional mandates.⁷⁰

B. *The Psychotherapist-Patient Privilege*

The psychotherapist-patient privilege, the second possible limitation upon the NTSB's investigatory powers, will be examined from the following perspectives: (1) historical origin; (2) theoretical justifications for the privilege; and (3) federal case law treatment of the privilege. As will be shown, the psychotherapist-patient privilege is of relatively recent origin. Furthermore, the theoretical underpinnings of the privilege are not necessarily supported by empirical studies, and although many states have codified the privilege, federal courts are split over recognition of such a privilege.

1. *Historical Origin of the Psychotherapist-Patient Privilege*

Examination of the general physician-patient privilege will help trace the origin of the psychotherapist-patient privilege. The physician-patient privilege is merely one of several types of "relational privileges," such as the attorney-client privilege and the clergy-parishioner privilege.⁷¹

⁷⁰ E.g., *E.I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 824 (S.D. W. Va. 1977) (enforcing subpoena duces tecum served by the National Institute for Occupational Safety and Health).

⁷¹ See generally Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 Sw. L.J. 661 (1985) (excellent contrast between the evidentiary treatment of the physician-patient relationship by the common law and the civil law systems). Shuman defines a number of terms relating to the physician-patient relationship:

Privilege is the common law term for a rule favoring privacy over probative evidence and professional secret is its civil law counterpart. Privilege and professional secret are not, however, different words describing the same thing as these doctrines differ substantially in their application.

Confidentiality is the ethical duty of the professional, operating outside of the judicial setting, not to disclose confidential communications made by the patient or client. Secrecy is the expectation that a communication will not be disclosed. Privacy is the ability to control revelation of information about oneself.

Id. at 661 n.1. For purposes of this paper, the distinction between a privilege and

Early Roman law, in refusing to compel an attorney to testify against his client, represents perhaps the earliest reference to a relational privilege.⁷² In the Middle Ages, canon law permeated continental European codes, resulting in a prohibition of clergy testifying against a parishioner who had "confessed."⁷³ English common law did not develop a need for relational privileges until the sixteenth century enactment of the Statute of Elizabeth which "abolished suit for maintenance against a witness and authorized penalties for a witness's refusal to testify."⁷⁴

Although the English common law quickly recognized an attorney-client privilege subsequent to the Statute of Elizabeth,⁷⁵ the physician-patient privilege did not appear in case law for over two centuries.⁷⁶ In *Rex v. Duchess of Kingston*,⁷⁷ Lord Mansfield rejected the notion that a physician's honor militated in favor of the existence of a physician-patient privilege:

If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will

a professional secret is not important, and thus the term privilege will be used to describe either concept.

⁷² Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928). Shuman speculated that the attorney-client privilege under Roman law probably derived from the prohibition against a slave or servant testifying against his master. Shuman, *supra* note 71, at 667.

⁷³ Shuman, *supra* note 71, at 668.

⁷⁴ *Id.* at 669. Prior to the fifteenth century, the jury functioned as trier and witness; other witnesses, viewed as meddlers, were discouraged from volunteering testimony by the threat of a suit for maintenance, a common law tort actionable against one who stirred up litigation. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 904 (1982).

⁷⁵ 8 JOHN HENRY WIGMORE, EVIDENCE § 2290, at 542-43 (J. McNaughten rev. ed. 1961).

⁷⁶ Shuman, *supra* note 71, at 671.

⁷⁷ 20 How. St. Tr. 355 (1776), *cited in* Shuman, *supra* note 71, at 671-73. In *Duchess of Kingston*, the testimony solicited from the physician related to the Duchess' disclosure of the father of her child, as distinguished from communications relating purely to her medical care. *Duchess of Kingston*, 201 How. St. Tr. at 577, *cited in* Shuman, *supra* note 71, at 671.

never be imputed to him as any indiscretion whatever.⁷⁸

Even to this day, English courts apparently do not recognize a general physician-patient privilege, the rationale for rejecting the privilege having shifted from an "honor among gentlemen" notion to the perceived lack of necessity for the privilege.⁷⁹ The courts believed that patients would not withhold information necessary for adequate treatment merely because of a remote threat of disclosure in a courtroom.⁸⁰

American legislatures, by contrast, have not been reluctant to establish, by statute, various types of physician-patient privileges. As of 1982, a survey conducted by Professor Shuman revealed that all but two states had a physician-patient, psychiatrist-patient, psychologist-patient, or psychotherapist-patient privilege statute.⁸¹ Interestingly, in spite of overwhelming support for a psychotherapist-patient privilege in the state legislatures, Congress declined to adopt the Supreme Court's proposed Federal Rule of Evidence 504,⁸² instead opting to enact a general

⁷⁸ *Duchess of Kingston*, 20 How. St. Tr. at 573, cited in Shuman, *supra* note 71, at 671. The reluctance of pre-1776 English courts to recognize a physician-patient privilege may have stemmed in part from the relatively unreliable nature of medical science; in fact, the medical "profession" was more akin to a trade, not considered worthy of an attorney's professional respect. Shuman, *supra* note 71, at 671-73. Some might argue that relations between the legal and medical professions have made little progress in the ensuing two centuries.

⁷⁹ Shuman, *supra* note 71, at 674-75.

⁸⁰ *Id.* at 674.

⁸¹ Shuman & Weiner, *supra* note 74, at 907. Common characteristics of the physician-patient privilege statutes among the states include: (1) application to judicially compelled disclosure only; (2) "ownership" of the privilege by the patient (thus, the patient can waive the privilege); and (3) the non-absoluteness of the privilege. Shuman, *supra* note 71, at 678.

⁸² The rejected psychotherapist-patient privilege, Rule 504, stated:

(a) DEFINITIONS. (1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist. (2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged. (3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview,

rule that preserved existing common law privileges and provided for the development of privileges in accordance with common law principles.⁸³ The theoretical bases tra-

or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) **GENERAL RULE OF PRIVILEGE.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) **EXCEPTIONS.**

(1) **Proceedings for hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **Examination by order of judge.** If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) **Condition an element of claim or defense.** There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

FED. R. EVID. 504, 56 F.R.D. 183, 240-44 (1972).

⁸³ ERIC D. GREEN & CHARLES R. NESSON, *FEDERAL RULES OF EVIDENCE* 73 (1988). In fact, Congress rejected each of the nine non-constitutional privileges proposed by the Supreme Court, instead choosing to enact a single general rule.

Id. The general rule, Rule 501, states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law

ditionally offered in favor of the psychotherapist-patient privilege are examined in the next section.

2. *Theoretical Justifications of the Psychotherapist-Patient Privilege*

Commentators have identified two different views of the theoretical underpinnings of the psychotherapist-patient privilege: a utilitarian approach and a deontological approach.⁸⁴ Dean Wigmore, in championing the utilitarian approach, suggested that any privilege must be justified by four relational elements:

(1) The communication sought to be protected must originate in a confidence that it will be free from disclosure.

(2) This confidence must be an integral part of a wholesome and complete relationship between the parties.

(3) This relationship must be one which the balance of the community desires to sedulously foster.

(4) The impairment of the relationship that would issue from disclosure must exceed the benefit that would be achieved in the litigation process by having the additional evidence.⁸⁵

The utilitarian approach balances the utility of the relational privilege to the "relationship it seeks to protect and the relationship's value to society."⁸⁶ The deontological approach, by contrast, insists that, due to personal autonomy reasons, society should protect extremely private personal revelations, such as communications between a patient and a psychotherapist, from unwarranted intru-

supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

FED. R. EVID. 501.

⁸⁴ See generally Shuman, *supra* note 71 (examining the basic analytical approaches to the conflict between the need to accept all relevant evidence and policies justifying exclusion of relevant evidence).

⁸⁵ 8 WIGMORE, *supra* note 75, at 527.

⁸⁶ Shuman, *supra* note 71, at 663.

sions.⁸⁷ The deontological approach to a psychotherapist-patient privilege tends to cross over into the realm of the right to privacy. Professor David Louisell, perhaps the chief proponent of the deontological view, has claimed that privileges stem from the "right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships."⁸⁸

Given the overlap between the deontological justification of a psychotherapist-patient privilege and the constitutional right to privacy, federal courts recognizing a federal psychotherapist-patient privilege have often addressed the constitutional right to privacy issue.⁸⁹ These courts stray from the original rationale for the privilege; the advisory committee note to proposed Federal Rule of Evidence 504 explicitly and exclusively relied upon the utilitarian approach as justification for the privilege.⁹⁰ Interestingly, even the utilitarian justification for the psychotherapist-patient privilege notoriously lacks empirical support.⁹¹ In the future, courts and commentators departing from the utilitarian approach and relying on the deontological approach are unlikely to find broad support in the constitutional right to privacy, given the reticence of the Rehnquist Supreme Court to expand any constitutionally based rights to privacy. The following section examines federal case law considering a federal psychotherapist-patient privilege.

⁸⁷ *Id.* at 665.

⁸⁸ David Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

⁸⁹ For discussion of cases recognizing a federal psychotherapist-patient privilege, see *infra* notes 92-138 and accompanying text.

⁹⁰ FED. R. EVID. 504 advisory comm. note, 56 F.R.D. 183, 240-44 (1972). After referencing articles and reports justifying existence of a psychotherapist-patient privilege, the note states that "[t]he conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied." *Id.* See also Shuman & Weiner, *supra* note 74, at 899.

⁹¹ See generally Shuman & Weiner, *supra* note 74 (concluding that the existence of a privileged relationship between psychotherapist and patient is of consequence to few patients in few cases).

3. *Case Law Discussing a Federal Psychotherapist-Patient Privilege*

In general, federal courts have been reluctant to recognize a federal psychotherapist-patient privilege. Many courts have refused to recognize the privilege for the formalistic reason that no such privilege existed at common law. As shown below, however, a decided split on the issue exists among the circuit courts of appeals. Courts embracing the privilege have often utilized the constitutional right to privacy to help justify the existence of the privilege.

a. *Courts Rejecting Recognition of a Federal Psychotherapist-Patient Privilege*

A number of courts have refused to recognize the existence of a federal psychotherapist-patient privilege.⁹² In *In re Doe*, the United States Court of Appeals for the Second Circuit held, *inter alia*, that the patient files of the defendant psychiatrist were not protected from disclosure by any federal psychotherapist-patient privilege.⁹³ As part of an investigation of a medical clinic allegedly serving as a front for the illegal sale of quaaludes, a grand jury subpoenaed patient files from a psychiatrist associated with the clinic.⁹⁴ The psychiatrist claimed that the psychotherapist-patient privilege shielded the files from production.⁹⁵ Rather than "leaping" to contemplation of the scope of the psychotherapist-patient privilege, the Second Circuit first considered whether such a privilege even existed under federal law. Noting that Congress had de-

⁹² See, e.g., *In re Doe*, 711 F.2d 1187 (2d Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976); *United States v. Colletta*, 602 F. Supp. 1322, 1327 (E.D. Pa.) ("[t]here is no general federal common-law physician-patient privilege"), *aff'd mem.*, 770 F.2d 1076 (3d Cir. 1985).

⁹³ *Doe*, 711 F.2d at 1193-94.

⁹⁴ *Id.* at 1189. The clinic apparently operated by hiring and paying doctors on a daily basis. Even though the doctors' medical specialties included acupuncture, gynecology, and psychiatry, the doctors prescribed quaaludes to over ninety percent of the clinic's patients. *Id.* at 1190.

⁹⁵ *Id.* at 1193.

clined to adopt the proposed Federal Rule of Evidence 504(b), the court then outlined a series of cases demonstrating that most courts which have grappled with the issue have decided that the privilege does not exist in federal law since no physician-patient privilege exists at common law.⁹⁶ The court further declined to recognize a psychotherapist-patient privilege after establishing that the four utilitarian conditions set forth by Wigmore were not satisfied;⁹⁷ in particular, the court was impressed by the lack of trust and confidence between the psychiatrist and the seventy patients "treated" per day on average and the want of any "intensely personal" communications in the patient files.⁹⁸ Almost as an afterthought, the court summed up with the conclusory "balancing test" statement that "the exclusion of [the psychiatrist's] patient files would not serve a public good that transcends the need for this evidence in the search for truth."⁹⁹

In *United States v. Meagher*, the United States Court of Appeals for the Fifth Circuit affirmed the conviction of Meagher for bank robbery.¹⁰⁰ The government had rebutted Meagher's insanity defense, in part, with correspondence between Meagher and his psychiatrist that indicated that Meagher was not insane.¹⁰¹ On appeal, Meagher contended that admission of the letters violated his psychotherapist-patient privilege.¹⁰² The Fifth Circuit rejected Meagher's appeal, concluding that no such privilege existed at common law.¹⁰³

⁹⁶ *Id.*

⁹⁷ For a list of the four Wigmore conditions, see *supra* note 85 and accompanying text.

⁹⁸ *Doe*, 711 F.2d at 1193.

⁹⁹ *Id.*

¹⁰⁰ *Meagher*, 531 F.2d at 754.

¹⁰¹ *Id.* at 752-53. The letters expressed regret by Meagher about his "sordid" life. *Id.* at 754.

¹⁰² *Id.* at 753.

¹⁰³ *Id.* The court further noted that even proposed Rule 504 explicitly excepted from the scope of the privilege those instances where a defendant relied upon mental condition as part of his defense. *Id.*; FED. R. EVID. 504(d)(3) (transmitted to Congress on Feb. 5, 1973, not enacted). See *infra* note 114.

b. *Courts Recognizing a Federal Psychotherapist-Patient Privilege*

A few federal courts have explicitly recognized a federal psychotherapist-patient privilege.¹⁰⁴ In consolidated appeals in *In re Zuniga*, the United States Court of Appeals for the Sixth Circuit affirmed civil contempt orders against two psychotherapists who had refused to appropriately respond to subpoenas duces tecum issued by grand juries. In each case, a psychotherapist had been implicated in an alleged scheme to defraud an insurance company.¹⁰⁵ In the first case, Pierce, a licensed psychiatrist in Michigan, refused to submit eighteen patient files and supporting documentation redacted to show only the names of the patients and times of their treatments.¹⁰⁶ In the second case, Zuniga, also a licensed psychiatrist, refused to comply with a similar grand jury subpoena duces tecum soliciting the records of 268 persons that he purportedly treated.¹⁰⁷ In each case, when the psychotherapist persisted in his refusal to comply with the subpoena even after denial of a motion to quash, the district court found the psychotherapist to be in civil contempt.¹⁰⁸ On consolidated appeal, Pierce and Zuniga asserted, *inter alia*, that the documents sought by the grand jury must be protected from disclosure based upon a psychotherapist-patient privilege and the patients' constitutional right to

¹⁰⁴ See, e.g., *In re Zuniga*, 714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 983 (1983); *NTSB v. Hollywood Memorial Hosp.*, 735 F. Supp. 423 (S.D. Fla. 1990) appeal dismissed, 933 F.2d 1021 (11th Cir. 1991); *United States v. Friedman*, 636 F. Supp. 462 (S.D.N.Y. 1986).

¹⁰⁵ *Zuniga*, 714 F.2d at 634.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 635. A second subpoena issued to Zuniga demanded that Zuniga produce the following records for 268 persons covering twenty-one specific dates over a six-year period: (1) patient appointment books indicating patient names and type or length of psychotherapeutical services rendered; (2) patient sign-in sheets; (3) Zuniga's daily activity logs; (4) patient files redacted to show patient name, date of service, and type of psychotherapy session rendered and billed; (5) original patient ledger cards; and (6) original intra-office forms indicating type and date of services rendered. *Id.*

¹⁰⁸ *Id.* at 634-36.

privacy.¹⁰⁹

In its analysis of the psychotherapist-patient privilege issue, the Sixth Circuit began by noting that questions of privilege were governed by federal law since the federal grand jury was investigating allegations of federal criminal law violations.¹¹⁰ After setting forth the text of Federal Rule of Evidence 501 in its entirety,¹¹¹ the court acknowledged that Congress had substituted this generalized privilege rule for the specific privilege rules (including rule 504, the psychotherapist-patient privilege) proposed by the Judicial Conference Advisory Committee on Rules of Evidence.¹¹² The court, however, disagreed with the Government's argument that Congress' election to reject the proposed rule 504 precluded recognition of a federal psychiatrist-patient privilege.¹¹³ The court noted that rule 501 explicitly allowed for development of federal evidentiary privileges.¹¹⁴ After citing the typical utilita-

¹⁰⁹ *Id.* at 636. For the Sixth Circuit's treatment of the argument based upon the constitutional right to privacy, see *infra* notes 173-78 and accompanying text.

¹¹⁰ *Id.*

¹¹¹ For the text of Federal Rule of Evidence 501, see *supra* note 83.

¹¹² *Zuniga*, 714 F.2d at 636.

¹¹³ *Id.* at 637.

¹¹⁴ *Id.* The Sixth Circuit quoted the following passage from an opinion of the Supreme Court: On the contrary, "[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privilege in federal criminal trials 'governed by the principles of the common law as they may be interpreted . . . in light of reason and experience.'" *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting FED. R. EVID. 501)). The view that a court might adopt a federal psychotherapist-patient privilege finds support in the Senate Report to the Federal Rules:

The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule [501] as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatric-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. REP. NO. 1277, 93d Cong., 2d Sess. 35,294 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

rian arguments in support of the psychotherapist-patient privilege,¹¹⁵ the Sixth Circuit catalogued a series of cases documenting the split in federal circuits regarding the privilege.¹¹⁶ Observing the adoption of diverse forms of psychotherapist-patient privileges by several states and noting the advocacy of commentators toward adoption of the privilege, the court rejected persuasive authority to the contrary and concluded that a "psychotherapist-patient privilege is mandated by 'reason and experience.'" ¹¹⁷

Having thus recognized the existence of a psychotherapist-patient privilege, the Sixth Circuit then turned its attention to the *scope* of the privilege. The court adopted a balancing test that weighed the "interests protected by shielding the evidence sought [against] those advanced by disclosure."¹¹⁸ Applying the balancing test to the information sought by the grand jury subpoenas, the court determined that the interests protected by shielding the names of patients and the dates and lengths of treatment were outweighed by society's significant interest in gathering all evidence related to enforcement of its laws.¹¹⁹ Thus, this information did not fall within the privilege.

¹¹⁵ *Zuniga*, 714 F.2d at 638. See also *supra* notes 85-86, 90 and accompanying text (discussing the utilitarian argument).

¹¹⁶ *Zuniga*, 714 F.2d at 638.

¹¹⁷ *Id.* at 639. The court stated:

[S]ociety has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community.

This Court has evaluated these interests, taking into account the aforementioned position of the states, the Judicial Conference Advisory Committee and various commentators, and finds that these interests, in general, outweigh the need for evidence in the administration of criminal justice. Therefore, we conclude that a psychotherapist-patient privilege is mandated by "reason and experience." Rule 501.

Id.

¹¹⁸ *Zuniga*, 714 F.2d at 640.

¹¹⁹ *Id.* In *Zuniga*, the court noted that even if the identity of the patient and span of treatment had fallen within the scope of the psychotherapist-patient privilege, the patients could not benefit from the privilege since the patients had previously disclosed their identities to the insurance company, a third party. *Id.*

In *NTSB v. Hollywood Memorial Hospital*,¹²⁰ Root, the "mystery" pilot, moved in the United States District Court for the Southern District of Florida to quash the NTSB's subpoena of his post-crash psychiatric records.¹²¹ In considering whether to grant Root's motion to quash, the court briefly discussed the status of the psychotherapist-patient privilege in Florida and in the Eleventh Circuit.¹²² Although the Eleventh Circuit had rejected recognition of a psychotherapist-patient privilege in criminal trials, the court noted that the law was unsettled in the Eleventh Circuit in the context of civil matters.¹²³ After citing federal cases which had accorded constitutional protection to communications in the psychotherapist-patient relationship, the district court set forth a balancing test more restrictive than that used in *Zuniga*:¹²⁴ "[t]he privilege will remain in effect unless a *compelling* state interest outweighs the privilege."¹²⁵

Rather than immediately applying the balancing test, the court then turned to a discussion of the constitutional right to privacy and applied a less restrictive balancing

¹²⁰ *NTSB v. Hollywood Memorial Hosp.*, 735 F. Supp. 423, 423 (S.D. Fla. 1990), *appeal dismissed*, 933 F.2d 1021 (11th Cir. 1991).

¹²¹ See *supra* notes 1-13 and accompanying text for the background of Root and *Hollywood Memorial Hosp.*

¹²² 735 F. Supp. at 423-24. The district court failed to explicitly analyze whether state or federal law on privileges should apply; however, the court appeared to base its decision on federal law. Thus, the court's revelation that the State of Florida does recognize a psychotherapist-patient privilege and that the Eleventh Circuit does not recognize such a privilege in criminal trials is merely informative in nature. See *id.* at 423; *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989) (rejecting psychotherapist-patient privilege in criminal trial); *Ursry v. Florida*, 428 So. 2d 713, 714 (Fla. Dist. Ct. App.), *petition for review denied*, 438 So. 2d 834 (Fla. 1983). See also FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1991).

¹²³ *Hollywood Memorial Hosp.*, 735 F. Supp. at 423. The district court presumably did not consider recognition of a psychotherapist-patient privilege in civil matters foreclosed by the Eleventh Circuit's rejection of the privilege in criminal trials since the state ostensibly may assert a more compelling interest in obtaining all of the evidence in a criminal trial.

¹²⁴ See *supra* note 118-19 and accompanying text.

¹²⁵ *Hollywood Memorial Hosp.*, 735 F. Supp. at 424 (emphasis added). In *Zuniga*, the court balanced "the interests protected by shielding the evidence sought with those advanced by disclosure." 714 F.2d at 640. Clearly, the *Zuniga* court required only a legitimate state interest to be balanced against the privilege.

test, requiring only a legitimate state interest to override the patient's privacy interest.¹²⁶ As in *Zuniga*, the court then set forth the typical utilitarian justifications for the psychotherapist-patient privilege, including Wigmore's four conditions necessary to establish a privilege,¹²⁷ and held that a federal psychotherapist-patient privilege existed.¹²⁸ In performing the balancing test, the court acknowledged that the NTSB's statutory duty to investigate Root's airplane crash established a valid public interest; however, the court held that Root's privilege was greater than the state interest, particularly since Root's communications were not part of a "criminal proceeding involving Root's claims or defenses."¹²⁹

Unfortunately, the court chose not to develop the extent of the public interest inherent in the NTSB's statu-

¹²⁶ *Hollywood Memorial Hosp.*, 735 F. Supp. at 424. The court stated "[a]gain, the privacy right must be balanced against legitimate state interests in order to protect the communications." *Id.* For discussion of the court's application of the balancing test in the context of the constitutional right to privacy, see *infra* notes 193-97 and accompanying text.

Upon close examination, the two balancing tests are definitely not identical. The common element of the tests is that the state interests are balanced against the interest sought to be protected. The protected interest in the psychotherapist-patient privilege is the confidential communication, while the protected interest in the constitutional analysis is the right to privacy. The privacy right ostensibly is broader than the mere communication between psychotherapist and patient and could extend to protect even the fact that the patient has received psychotherapeutic services. Thus, the balancing tests are not precisely the same. More importantly, a court would be remiss if it jumped immediately to application of either balancing test without first establishing that the interest sought to be protected is entitled to protection at all. That is, a sagacious court should not apply a balancing test to determine the *scope* of a psychotherapist-patient privilege without first establishing that a federal psychotherapist-patient privilege even *exists*. Likewise, a court should not apply a balancing test to determine whether the legitimate state interests outweigh the patient's privacy interest without first establishing that the privacy interest in question has been afforded constitutional protection. Finally, even if the interests sought to be protected essentially merge into the same interest, the balancing test would not be identical unless the court further determines that the appropriate standard of review is identical. Obviously, a "compelling" state interest standard is not identical to a "legitimate" state interest standard.

¹²⁷ For Wigmore's four conditions necessary to establish a privilege, see *supra* text accompanying note 85.

¹²⁸ *Hollywood Memorial Hosp.*, 735 F. Supp. at 424-25.

¹²⁹ *Id.*

tory duty to investigate air accidents.¹³⁰ As previously discussed, Congress has charged the NTSB with important functions including investigation and reporting of air accidents and recommendation of steps to prevent similar accidents.¹³¹ In addition to failing to develop the extent of the public interest, the court also neglected to discuss whether Root had waived the psychotherapist-patient privilege, if any existed, by choosing to become a certified pilot, at least to the extent that communications between Root and his psychotherapists might reveal a psychosis that could be the basis for the NTSB to deny medical certification.¹³² The court's brevity in application of the balancing test suggests that the court did not consider the test seriously, unlike *Zuniga*, where the Sixth Circuit recognized that while a psychotherapist-patient privilege existed, serious application of the balancing test militated against automatic application of the privilege.

¹³⁰ Rather, the court perfunctorily concluded that the "specific injury to the psychiatric-psychotherapist patient relationship which will follow disclosure in cases of this type is greater than the particular state interest involved." *Id.* at 425.

¹³¹ For discussion of responsibilities of the NTSB, see *supra* notes 36-48 and accompanying text.

¹³² *Hollywood Memorial Hosp.*, 735 F. Supp. at 424-25. Based on the following regulations, the NTSB can deny medical certification to a pilot with a psychosis. Subsection (d)(1)(i)(b) of sections 67.13 (first-class medical certificate), 67.15 (second-class medical certificate), and 67.17 (third-class medical certificate) of the Federal Aviation Regulations reads in pertinent part:

(d) Mental and neurologic—

(1) Mental.

- (i) No established medical history or clinical diagnosis of either of the following:

.....

(b) A psychosis.

F.A.A. Medical Standards and Certification, 14 C.F.R. §§ 67.13(d)(1)(i)(b), 67.15(d)(1)(i)(b), 67.17(d)(1)(i)(b) (1991). The NTSB has denied medical certification of pilots upon findings that suicide attempts indicated a psychosis. See, e.g., *McCartor v. Okamoto*, NTSB Docket No. SE-10170 (May 31, 1989) (student pilot flew into rage and struck flight instructor in apparent suicide attempt); *In re Forrette*, NTSB Order No. EA-2929 (April 3, 1989) (suicide attempt by paranoid schizophrenic); *Administrator v. Hopkins*, 2 N.T.S.B. 2318 (1976) (suicide attempt following cancellation of marriage by bride-to-be); *Administrator v. Badley*, 2 N.T.S.B. 1468 (1975) (three suicide attempts); *Administrator v. Evert*, 1 N.T.S.B. 489 (1969) (two suicide attempts).

In *United States v. Friedman*,¹³³ the United States District Court for the Southern District of New York also considered whether to apply a federal psychotherapist-patient privilege. In *Friedman*, the defendant in a criminal prosecution subpoenaed the psychiatric records of a person anticipated to be an adverse witness in his criminal trial.¹³⁴ The patient moved to quash the subpoenas by virtue of the psychotherapist-patient privilege. Following *in camera* inspection of the records, the court substantially granted the motion to quash.¹³⁵ Unlike *Hollywood Memorial Hospital*, the court noted that courts have addressed protection of psychiatric records in terms of both privilege and right to privacy.¹³⁶ Under either approach, the court further noted that the analysis generally reduced to a balancing of "the interest in disclosure of the particular material there at issue against the witness-patient's interest in the confidentiality of that information."¹³⁷ Unfortunately, the court did not first expressly consider whether a federal psychotherapist-patient privilege should exist at all or whether the constitutional right to privacy should protect such communications. Choosing to base its decision upon the privilege approach, the court held that the communications between the witness and his psychiatrist were entitled to protection under the psychotherapist-patient privilege since all four of the Wigmore conditions were satisfied.¹³⁸

¹³³ 636 F. Supp. 462 (S.D.N.Y. 1986).

¹³⁴ *Id.* at 462.

¹³⁵ *Id.* The court acknowledged that its decision was *not* an evidentiary ruling since the content of the psychiatric records of the purported witness was irrelevant to the criminal charges against the defendant. Instead, the court was considering whether to permit use of the psychotherapist-patient privilege to preclude even discovery of the material. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 463. The court justified its application of the privilege as follows:

[T]he material here subpoenaed contains the type of intensely personal communications that the psychotherapist-patient privilege is designed to protect. The notes contain extremely personal statements made by the patient, recollections of past experiences, notes of dreams, as well as observations of the patient by the doctor.

c. *Psychotherapist-Patient Privilege in the Context of NTSB Air Accident Investigations*

As the cases in the preceding sections demonstrate, there is a decided split in authority over whether to recognize a federal psychotherapist-patient privilege. The pertinent question here is not only whether the privilege should exist at all but whether the privilege, if a court should choose to recognize it, may be used as a stumbling block to the NTSB's statutory authority to investigate air accidents. If a court bases the privilege on Wigmore's four utilitarian conditions,¹³⁹ the court should establish that the enormous benefit that society receives from complete and accurate air accident investigations by the NTSB is outweighed by the impairment to the psychotherapist-patient relationship caused by disclosure. When the patient is a licensed pilot, the court should further address whether the patient has chosen to waive any psychotherapist-patient privilege, at least to the extent that the communications might reveal the probable cause of the accident. Unfortunately, the court in *Hollywood Memorial Hospital* neglected to address or develop these issues.¹⁴⁰

On the other hand, if the court relies upon the deontological approach to establish the privilege, the court is still obligated to decide whether the privilege, qualified in nature, is overridden by the societal interest in permitting the NTSB to obtain the additional evidence. This balancing test overlaps with the utilitarian analysis of the preceding paragraph as well as the subsequent discussion of the constitutional right to privacy.

C. *The Constitutional Right to Privacy*

The third limitation upon the NTSB's investigatory powers addressed in this comment is the constitutional

Id. For Wigmore's four conditions necessary to establish a privilege, see *supra* note 85 and accompanying text.

¹³⁹ See *supra* note 85 and accompanying text.

¹⁴⁰ NTSB v. Hollywood Memorial Hosp., 735 F. Supp. 423 (S.D. Fla. 1990), appeal dismissed, 933 F.2d 1021 (11th Cir. 1991).

right to privacy. This controversial right will be discussed as follows: (1) origin and development of the constitutional right to privacy; (2) application of the constitutional right to privacy in the context of medical or psychotherapeutic records; and (3) analysis of the constitutional right to privacy in the context of NTSB air accident investigations.

1. *Origin and Geneology of the Constitutional Right to Privacy*

Thousands of trees have likely been felled to accommodate the words penned tracing the evolution of the constitutional right to privacy. Thus, little would be gained in this comment through an exhaustive treatment of the subject. Nevertheless, a brief summary of the development of the constitutional right to privacy will shed light on the case law discussed in the subsequent section.

Although there is wide disparity of opinion over the origin of the constitutional right to privacy,¹⁴¹ most commentators would agree that *Griswold v. Connecticut*¹⁴² breathed life into the modern doctrine.¹⁴³ In *Griswold*, the Supreme Court struck a Connecticut statute relating to contraceptives on the grounds that the statute infringed upon the right of married persons to decide whether to use contraceptives, a right found to be protected by a "penumbra" of constitutional privacy rights.¹⁴⁴ Justice Doug-

¹⁴¹ See Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (many point to this seminal article as the first to articulate the right to privacy); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (conceptualizing a "right to be let alone"). But see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740-41 (1989) (in which *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) is considered as ancient precedent for the proposition that the Supreme Court may reach beyond the express language of the Constitution to strike legislation offensive to Constitutional principles).

¹⁴² 381 U.S. 479 (1965).

¹⁴³ See, e.g., Rubenfeld, *supra* note 141. "The emergence of this substantive right to privacy, and hence the constitutional protection of the conduct to which it applies, is of very recent origin. The doctrine is only some twenty years old." *Id.* at 740. "The right to privacy was first announced in *Griswold v. Connecticut*" *Id.* at 740 n.11.

¹⁴⁴ 381 U.S. at 485.

las, writing for the Court, eschewed any reliance upon the discarded doctrine of substantive due process¹⁴⁵ and purported to find a general right to privacy in the "penumbras" of the first, fourth, fifth, and ninth amendments to the Constitution.¹⁴⁶ Unlike Douglas, other justices have not hesitated to link the constitutional right to privacy with the due process clause of the fourteenth amendment, despite the undeniable similarities with the loathsome doctrine of Lochnerism.¹⁴⁷

Perhaps because of the Supreme Court's difficulty in attaching this constitutional right to privacy to an enumerated constitutional provision, post-*Griswold* cases have had trouble articulating the scope of the right.¹⁴⁸ Nevertheless, the Court's right to privacy decisions have been described as protecting two distinct types of privacy interests: "the individual interest in avoiding disclosure

¹⁴⁵ *Id.* The use of the substantive due process doctrine is typified by early twentieth century cases such as *Lochner v. New York*, 198 U.S. 45 (1905). Under the fourteenth amendment, the doctrine was applied to strike state regulations which infringed upon fundamental economic rights, such as the liberty of contract. *Lochner* and its progeny proved to be a much criticized line of cases, and the Court eventually abandoned its substantive due process jurisprudence. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938) (affording state economic regulations a presumption of constitutionality). As recently as two years prior to *Griswold*, the Court again renounced Lochnerism, stating that it "emphatically refuse[d] to go back to the time when courts used the Due Process Clause 'to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

¹⁴⁶ *Griswold*, 381 U.S. at 484.

¹⁴⁷ In *Griswold*, Justice Goldberg argued that the due process clause of the fourteenth amendment protects all "fundamental" rights. *Id.* at 486 (Goldberg, J., concurring). Justice Harlan asserted that the due process clause protects those basic values "implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 349, 325 (1937)). See also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (Blackmun, J.) (finding "[t]his right of privacy" to "be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"). This comment may refer to a case as one involving a constitutional right to privacy when the particular issue might be better characterized as merely involving a "fundamental" right protected by the doctrine of substantive due process.

¹⁴⁸ *E.g. Roe*, 410 U.S. at 153 (stating that, regardless of its source, "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

of personal matters, and . . . the interest in independence in making certain kinds of important decisions.”¹⁴⁹ The first interest can be characterized as an informational privacy interest, protecting against governmental disclosure of intimate matters.¹⁵⁰ The second interest, termed a privacy interest of autonomy, protects against governmental compulsion in making important personal decisions.¹⁵¹

Regardless of the type of privacy implicated, *Griswold* and its progeny make it clear that the fundamental rights afforded the highest degree of protection under the umbrella of the constitutional right to privacy tend to fall within three related areas: family relationships, marriage, and procreation.¹⁵² Outside of these areas, courts recognize other privacy interests which, although perhaps wor-

¹⁴⁹ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (opinion of Stevens, J.). Justice Stevens cited Professor Kurland as having first categorized the three aspects of a constitutional right to privacy: (1) an individual's right to be free from governmental intrusion into his personal affairs; (2) an individual's right to preclude the government from disclosing his private affairs; and (3) an individual's right to be free from government coercion in making certain vital decisions. *Id.* at 599 n.24 (quoting from Kurland, *The Private I*, U. CHI. MAG. 7, 8 (Autumn 1976)). The second and third aspects of privacy identified by Kurland are the categories mentioned in the text.

¹⁵⁰ See, e.g., *Griswold*, 381 U.S. at 483 (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion”). This interest has been termed the “informational” or “confidential” privacy interest.

¹⁵¹ *Roe*, 410 U.S. at 153 (“This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”). In *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court stated that these autonomous decisions pertain to “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.” *Id.* at 713.

¹⁵² *Hardwick v. Bowers*, 478 U.S. 186, 190-91 (1986) (White, J.) (refusing to strike state sodomy statute on privacy grounds since “homosexual activity” has no connection to the three categories of activity protected by the constitutional right to privacy: family relationships, marriage, and procreation). See also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry encompassed by right to privacy); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (striking zoning ordinance which allowed only members of a single “family” to reside together on right to privacy grounds); *Roe*, 410 U.S. 113 (abortion encompassed by right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to obtain contraception falls within right to privacy); *Griswold*, 381 U.S. at 479 (right to contraception falls within right to privacy). But see *Whalen*, 429 U.S. at 589 (rights of prescription drug users in precluding the state from gathering information about their drug use not encompassed by right to privacy).

thy of constitutional protection, appear to be afforded lesser protection.¹⁵³ A court's choice of the applicable standard of review is often the decisive factor in determining whether an alleged constitutional right to privacy has been violated.

The Supreme Court has developed at least two different standards of review to apply in substantive due process cases. First, where the Court finds that a "fundamental" right has been impaired by a statute, the Court applies a standard that approaches strict scrutiny: the state's objective must be shown to be "compelling," and the relation between the state's objective and the statutory means chosen must be extremely close, so that the means can be said to be "necessary" to effect that end.¹⁵⁴ Second, where the Court has not deemed the right infringed upon as "fundamental," the Court applies a rational relation standard of review: the state's objective must be shown to be merely "legitimate," not "compelling," and the statutory means chosen must bear a rational relation to the legitimate state objective.¹⁵⁵ The significance of the twofold standard of review is crucial. Where the right infringed upon is non-fundamental, the Court's extreme deference to the legislative enactment is pervasive, resulting in virtually no scrutiny at all. Where a fundamental right is besieged, very few statutes are sustained under the strict scrutiny

¹⁵³ *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 465 (1977) (Brennan, J.) (recognizing that former President Nixon had a "legitimate expectation of privacy in his personal communications" but rejecting Nixon's claim that the Presidential Recordings and limited infringement under the Materials Preservation Act was permissible); *Whalen*, 429 U.S. at 605-06 (Stevens, J.) (implicitly recognizing that individuals may have a constitutionally protected privacy interest in precluding "unwarranted governmental disclosure of accumulated private data," but holding that the New York State Controlled Substances Act did not violate any such right to privacy).

¹⁵⁴ *Roe*, 410 U.S. at 155. The Supreme Court, speaking through Justice Blackmun, stated: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (citations omitted).

¹⁵⁵ *Whalen*, 429 U.S. at 589; *Ferguson*, 372 U.S. at 731 (Black, J.) (stating that, in the context of economic legislation, the Court "refuse[s] to sit as a 'superlegislature to weigh the wisdom of legislation.'").

standard employed by the Court. Because rights deemed to be fundamental have often fallen within the autonomy strand of privacy interests,¹⁵⁶ many regulations touching upon these areas have been struck on substantive due process grounds. Conversely, the interests within the informational strand of privacy have less often been characterized as fundamental;¹⁵⁷ thus, the Court's deferential standard of review has typically resulted in validation of statutes impinging upon informational privacy interests.

Roe v. Wade and *Whalen v. Roe* are illustrative of the Supreme Court's application of the different standards of review. In *Roe v. Wade*, the Court considered a constitutional attack on Texas criminal abortion legislation.¹⁵⁸ The Court, speaking through Justice Blackmun, first determined that a woman's decision "whether or not to terminate her pregnancy" was a fundamental privacy right worthy of constitutional protection under the "Fourteenth Amendment's concept of personal liberty."¹⁵⁹ The Court then recognized that this right of privacy was not unqualified, and hence must be weighed against state interests.¹⁶⁰ The Court then noted that the state had legitimate interests both "in protecting the health of a pregnant woman and in protecting the potentiality of human life."¹⁶¹ At some point during the pregnancy, the Court declared that these distinct, legitimate state inter-

¹⁵⁶ See *supra* notes 149-53 and accompanying text.

¹⁵⁷ See *Whalen*, 429 U.S. at 589. But cf. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316-17 (1979) (holding that the NLRB abused its discretion by ordering an employer to supply a labor union with copies of employee psychological aptitude tests).

¹⁵⁸ *Roe*, 410 U.S. at 116. The continued viability of *Roe v. Wade*, in the aftermath of *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989), is irrelevant for purposes of this discussion, which examines *Roe v. Wade* only as illustrative of the Supreme Court's application of the strict scrutiny standard of review. Of course, this irrelevancy presumes that a Rehnquist Court, in overturning *Roe v. Wade*, would not completely repudiate the constitutional right to privacy.

¹⁵⁹ *Roe*, 410 U.S. at 153.

¹⁶⁰ *Id.* at 154. The Court stated: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.*

¹⁶¹ *Id.* at 162.

ests become "compelling" enough to override the woman's right of autonomy in making this important decision.¹⁶²

In *Whalen v. Roe*,¹⁶³ a group of patients receiving prescriptions for Schedule II drugs and the prescribing doctors challenged the constitutionality of the New York State Controlled Substances Act of 1972, which required the recording of the names and addresses of all individuals who receive prescription drugs for which there is also an unlawful market.¹⁶⁴ The district court held that, merely by requiring the recording of patients' names and addresses, the statute impermissibly intruded upon the doctor-patient relationship which is protected by the constitutional right to privacy.¹⁶⁵ In reversing the injunction granted by the district court, the Supreme Court first noted that *Lochnerism*¹⁶⁶ had been rejected many times, and that "[s]tate legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."¹⁶⁷ The Court implicitly applied the rational relation standard of review to uphold the New York statute. For example, the Court stated that the statute was "manifestly the product of an orderly and *rational* legislative de-

¹⁶² *Id.* at 162-63. In an extraordinarily precise constitutional holding, the Court found that the state's interest in protecting the health of the pregnant woman did not become "compelling" until the end of the first trimester of pregnancy; thus, a woman's abortion decision must be "free of interference by the State" during the first trimester. *Id.* at 163. With respect to the legitimate state interest in protecting life, or at least the potentiality of life, the state's interest did not become "compelling" until the fetus reached viability; thus, after viability, the Court stated that the state "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-64.

¹⁶³ 429 U.S. 589 (1977).

¹⁶⁴ *Whalen*, 429 U.S. at 591, 595. The names and addresses of the applicable prescription drug users were recorded in a centralized computer file. *Id.* at 591. The statute expressly prohibited public disclosure of the individuals' identities. *Id.* at 594.

¹⁶⁵ *Id.* at 595-96.

¹⁶⁶ For a discussion of the *Lochner* decision see *supra* note 145.

¹⁶⁷ *Whalen*, 429 U.S. at 597. The Court further stated that "[w]e have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Id.*

cision.”¹⁶⁸ The Court then described the autonomous and informational strands of privacy interests protected generally by the Constitution and implicitly recognized that the patient-identification portion of the statute touched both strands of privacy;¹⁶⁹ however, the Court held that the statute did not “pose a sufficiently grievous threat to either interest to establish a constitutional violation.”¹⁷⁰ In a concurring opinion, Justice Brennan suggested that the Court would resort to a strict scrutiny standard of review if the statute purported to authorize state officials to publicly disclose the information.¹⁷¹

Roe v. Wade and *Whalen v. Roe* demonstrate that the Supreme Court’s willingness to strike a statute on constitutional right to privacy grounds depends upon the standard of review employed by the Court. Furthermore, the appropriate standard of review appears to be related to the type of privacy interest implicated. The strict scrutiny standard is typically used for analysis of fundamental, autonomous privacy rights and the rational relation standard is ordinarily used for analysis of non-fundamental, informational privacy rights.

¹⁶⁸ *Id.* (emphasis added). The Court further stated that the statute’s “patient-identification requirement was a reasonable exercise of New York’s broad police powers.” *Id.* at 598. Unlike *Roe v. Wade*, nowhere in the *Whalen v. Roe* opinion does the Court claim that New York had a “compelling” state objective.

¹⁶⁹ *Whalen*, 429 U.S. at 599-600.

¹⁷⁰ *Id.* at 600. The patients maintained that the recording of patient-identification and the accompanying fear of public disclosure would make “some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even where their use is medically indicated.” *Id.* The patients claimed that their informational rights to privacy were impermissibly infringed upon by compelled disclosure of private medical information. *Id.* They further claimed that this violated their autonomous rights of privacy by negating their independence in making important personal health decisions. *Id.*

¹⁷¹ *Id.* at 606 (Brennan, J., concurring). Justice Brennan stated that “[b]road dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.” *Id.* In a separate concurring opinion, Justice Stewart took issue with the implication in Brennan’s concurrence that the Court would recognize general, fundamental constitutional privacy rights outside of the ordinary context, such as marriage, the home, and contraceptives. *Id.* at 607-09 (Stewart, J., concurring).

2. *The Constitutional Right to Privacy in a Medical or Psychotherapeutical Context*

Using the above generalized discussion of the Supreme Court's treatment of the constitutional right to privacy as a backdrop, this section examines cases in which the constitutional right to privacy has been invoked in the context of medical or psychotherapeutical records. From the outset, it should be noted that the privacy rights implicated in such cases ordinarily fall within the "informational" strand of privacy interests, rather than the "autonomical" strand of privacy interests. Thus, courts have often employed the rational relation standard of review, rather than the strict scrutiny standard.

a. *Cases Favoring the Governmental Interest over the Privacy Interest*

In a number of decisions in the context of medical or psychotherapeutical records, courts have found that a particular state action did not impermissibly infringe upon the constitutional right to privacy.¹⁷² In one of these

¹⁷² See, e.g., *In re Search Warrant (Sealed)*, 810 F.2d 67 (3d Cir.) (holding that seizure of medical records pursuant to a search warrant implicated the patients' "informational" rights to privacy, but that these privacy interests were outweighed by the legitimate interests of the government in securing evidence against the physician in an investigation for insurance fraud, especially since the patients had diminished privacy interests by virtue of their submission of claims to insurance companies), *cert. denied sub nom. Rochman v. United States*, 483 U.S. 1007 (1987); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980) (holding that the National Institute for Occupational Safety and Health's (NIOSH) solicitation of a company's employees' medical records implicated the employees' constitutional rights to privacy, but that these privacy interests were outweighed by NIOSH's interest in investigating employees' exposure to hazardous chemicals); *Caesar v. Mountanos*, 542 F.2d 1064, 1069 (9th Cir. 1976) (holding that communications between psychotherapist and patient fall within the ambit of fundamental, constitutionally protected privacy rights but that the compelling state interest of insuring that the "truth is ascertained in legal proceedings in its courts of law" outweighs the privacy right), *cert. denied*, 430 U.S. 954 (1977); *United States v. Colletta*, 602 F. Supp. 1322, 1327 (E.D. Pa.) (in case where defendant doctor was accused of defrauding insurance companies, court first stated that no general physician-patient privilege exists at federal common law and then held that the state's interest in deterring mail fraud outweighed the patients' constitutional privacy interests), *aff'd mem.*, 770 F.2d 1076 (3d Cir. 1985); *Miller v. Colonial Refrigerated*

cases, *In re Zuniga*,¹⁷³ a psychiatrist under investigation for a scheme to defraud an insurance company refused to comply with a subpoena duces tecum requesting some of his patients' files. The psychiatrist's refusal was based on the grounds that the documents were protected from disclosure by the psychotherapist-patient privilege and by his patients' constitutional right to privacy.¹⁷⁴ The court first stated that even if such a privacy right existed, it would not be absolute.¹⁷⁵ As in *Whalen v. Roe*,¹⁷⁶ the court noted that modern medical procedures, which involve disclosures of private medical information not only to doctors but also to insurance companies and public health agencies, result in a patient's diminished privacy interest.¹⁷⁷ Citing *Whalen v. Roe*, the court then balanced the limited privacy intrusion against the state's legitimate interest attending a grand jury's proceedings.¹⁷⁸

Transp. Inc., 81 F.R.D. 741 (M.D. Pa. 1979) (in action to recover damages for posttraumatic neurosis, court held that even if a psychotherapist-patient privilege protected by the constitutional right to privacy was deemed to exist, it must succumb to the legitimate state interest in obtaining truth and fairness in adversarial legal proceedings); *Lora v. Board of Educ.* 74 F.R.D. 565, 576 (E.D.N.Y. 1977) (where plaintiffs alleged that school district identified emotionally handicapped children in a racially discriminatory manner and sought production of anonymous psychotherapeutical records, the court held that both the students' constitutional rights to privacy and the psychotherapist-patient privileges must be considered, but that the "legitimate and weighty competing private and state interests" outweighed the privacy interests and privileges); *E.I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821 (S.D. W.Va. 1977) (upholding NIOSH's subpoena duces tecum for plaintiff's employees' medical records over a constitutional right to privacy assertion given the legitimate interest of NIOSH in investigating unusually high cancer rates among the employees); *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623 (N.Y. App. Div. 1982) (holding that Chapman, John Lennon's assassin, did not have a constitutional right to privacy broad enough to preclude the state's prevention of Chapman's attempted suicide by starvation).

¹⁷³ 714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 983 (1983).

¹⁷⁴ *Id.* at 634-36. For discussion of the *Zuniga* court's recognition of the psychotherapist-patient privilege, see *supra* notes 104-19 and accompanying text.

¹⁷⁵ *Zuniga*, 714 F.2d at 641.

¹⁷⁶ 429 U.S. 589 (1977). For discussion of *Whalen v. Roe*, see *supra* notes 163-71 and accompanying text.

¹⁷⁷ *Zuniga*, 714 F.2d at 641. The court reiterated that "a person possesses no reasonable expectation that his medical history will remain *completely* confidential." *Id.* (emphasis in original).

¹⁷⁸ *Id.* at 641-42. The court stated:

Furthermore, the information sought will be protected by the veil of

In *United States v. Westinghouse Electric Corp.*,¹⁷⁹ the United States Court of Appeals for the Third Circuit upheld a subpoena duces tecum issued by an administrative agency over a claim of constitutional right to privacy.¹⁸⁰ In *Westinghouse*, the NIOSH received a request for a health hazard evaluation from a Westinghouse employee.¹⁸¹ Following a plant visit, NIOSH physicians solicited access to medical records of those employees working in a potentially hazardous area.¹⁸² After Westinghouse's initial rebuff of the voluntary request for the records, the Director of NIOSH issued a subpoena duces tecum to Westinghouse's custodian of records, but Westinghouse again refused to produce the records.¹⁸³ Upon NIOSH's filing of an action, the district court ordered full enforcement of the subpoena, rejecting Westinghouse's assertion that the information was protected from disclosure by physician-patient privileges or by the employees' constitutional rights to privacy.¹⁸⁴

On appeal, the Third Circuit characterized the privacy interest implicated as falling within the "informational" strand of privacy interests, "the right not to have an individual's private affairs made public by the government."¹⁸⁵ The court then declared that NIOSH could

secrecy attending grand jury proceedings. Accordingly, . . . the information will be disclosed only to the minimal extent necessary to promote a proper governmental interest In sum, weighing the slight intrusion on the patients' privacy interest against the need for the grand jury to conduct an effective and comprehensive investigation into alleged violation of the law, the Court concludes that enforcement of the subpoenas does not unconstitutionally infringe on the rights of the patients.

Id. at 642.

¹⁷⁹ 638 F.2d 570 (3d Cir. 1980).

¹⁸⁰ *Id.* at 580.

¹⁸¹ *Id.* at 572. NIOSH was established by the Occupational Safety and Health Act of 1970 to establish occupational safety and health guidelines and to conduct health hazard investigations. *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 572-73.

¹⁸⁴ *Id.* at 573.

¹⁸⁵ *Id.* at 577. The court stated that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protections." *Id.* For a

intrude into this zone of privacy only upon a showing that the "societal interest in disclosure outweighs the privacy interest on the specific facts of the case."¹⁸⁶ The court performed the balancing test by considering a number of factors.¹⁸⁷ These factors included the interest of Westinghouse employees and the public at large in occupational safety and health; the merely private, rather than extremely sensitive nature of the materials; and NIOSH's procedures to prevent unauthorized disclosure.¹⁸⁸ The court concluded that legitimate public interests of NIOSH outweighed the minor encroachment upon the employees' privacy interest.¹⁸⁹

As *Westinghouse* and *Zuniga* demonstrate, courts ostensibly recognizing a constitutional right to privacy in the context of medical or psychotherapeutical records have often followed the example of *Whalen v. Roe* in permitting merely legitimate, rather than compelling, governmental interests to prevail over privacy interests.

b. *Cases Favoring the Privacy Interest over the Governmental Interest*

On the other hand, a few courts have determined that a

discussion of the "informational" strand of privacy interests, see *supra* note 150 and accompanying text.

¹⁸⁶ *Westinghouse*, 638 F.2d at 578.

¹⁸⁷ *Id.* at 578-80. The Third Circuit proposed that the following factors should be considered in the balancing test:

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. at 578.

¹⁸⁸ *Id.* at 579-80.

¹⁸⁹ *Id.* at 580. Recognizing that some of Westinghouse's employees might feel that their medical records might contain especially sensitive information, the court required NIOSH to notify the employees whose medical records would be examined in order to permit such employees to assert their own privacy claims. *Id.* at 580-81.

particular state action impermissibly infringed upon the constitutional right to privacy in the medical or psychotherapeutical context. *Hawaii Psychiatric Society v. Ariyoshi*¹⁹⁰ involved a Hawaii Medicaid fraud statute which authorized the issuance of administrative inspection warrants upon a showing of probable cause. A warrant was issued authorizing the search and seizure of a licensed clinical psychologist's records relating to Medicaid beneficiaries.¹⁹¹ The court issued a preliminary injunction upon a finding that there was a substantial probability that the psychotherapist would prevail on the claim that the statute violated patients' constitutional rights to privacy.¹⁹²

In *NTSB v. Hollywood Memorial Hospital*,¹⁹³ Root, the "mystery" pilot, moved in the district court to quash the NTSB's subpoena of his post-crash psychiatric evaluation on the grounds, in part, that enforcement of the subpoena would violate his constitutional right to privacy. The court first categorized the interest that Root sought to protect as falling within the informational strand of constitutional privacy interests.¹⁹⁴ The court then asserted that Root's privacy right must be balanced against the legitimate state interests of the NTSB in investigating air accidents.¹⁹⁵ Before performing this balancing test, the court turned its attention to a justification of a psychotherapist-patient privilege, apparently attaching constitutional significance to the privilege.¹⁹⁶ With considerable

¹⁹⁰ 481 F. Supp. 1028 (D. Haw. 1979).

¹⁹¹ *Id.* at 1034.

¹⁹² *Id.* at 1052.

¹⁹³ 735 F. Supp. 423 (S.D. Fla. 1990), *appeal dismissed*, 933 F.2d 1021 (11th Cir. 1991). For the factual history of the case, see *supra* notes 1-13 and accompanying text. For discussion of the court's analysis of the psychotherapist-patient privilege issue, see *supra* notes 120-32 and accompanying text.

¹⁹⁴ *Hollywood Memorial Hosp.*, 735 F. Supp. at 424. The court declared that "[t]he constitutional right to privacy extends to the individual interest in avoiding the disclosure of personal matters, and medical or psychiatric records fall within that sphere." *Id.*

¹⁹⁵ *Id.* The NTSB claimed that it needed to know Root's mental condition in order to satisfactorily perform its statutory duty to ascertain the probable cause of the air accident. *Id.*

¹⁹⁶ *Id.* at 424-25.

discussion of Root's privacy interest in his psychiatric records but very little discussion of the NTSB's interests, the court, in conclusory fashion, held that the governmental interest did not survive the balancing test.¹⁹⁷

These cases reveal that a few courts have used more than the rational relation standard of review to analyze cases implicating the informational strand of the constitutional right to privacy despite the refusal of the Supreme Court to require more than a rational relation in *Whalen v. Roe*.¹⁹⁸ In *Hawaii Psychiatric*, the court framed its inquiry in terms of whether the statute "burdens the individual's liberty to make decisions regarding psychiatric care, and, if so, whether the state has demonstrated that the statute represents the least restrictive means to achieve a compelling state interest."¹⁹⁹ In *Hollywood Memorial Hospital*, however, the court clearly failed to identify and develop the legitimate public interests served in facilitating accurate investigatory procedures by the NTSB; thus, the court "easily" concluded that the balance tipped in favor of the constitutional right to privacy. The *Westinghouse* decision stands in stark contrast to *Hollywood Memorial Hospital*. In *Westinghouse*, the court at least elucidated the factors that it considered important in the balancing test before deciding whether NIOSH had asserted a legitimate interest that outweighed the privacy interest. Nevertheless, the standard of review employed by a court again seemed to be the dispositive factor in deciding whether the governmental interest should prevail.

¹⁹⁷ *Id.* at 425. The court declared that "[a] balancing of Root's right against that of the [NTSB] and the public interest demonstrates that Root's privilege has not been overcome." *Id.* The significance of this statement is that since the public interest did not overcome Root's privilege, rather than Root's constitutional right to privacy, the court must have meant that the NTSB did not assert a "compelling" governmental interest, rather than merely a "legitimate" state interest. The court thus gave Root's psychiatric records greater protection under the common law based psychotherapist-patient privilege than even the constitutional right to privacy would have afforded.

¹⁹⁸ See *supra* notes 163-71 and accompanying text.

¹⁹⁹ 481 F. Supp. at 1039.

3. *The Constitutional Right to Privacy in the Context of
NTSB Air Accident Investigations*

*NTSB v. Hollywood Memorial Hospital*²⁰⁰ appears to be the first published opinion resolving a claim that an NTSB investigation infringed upon an individual's constitutional right to privacy. Unfortunately, the court, in its brief, two-page opinion, dealt with the issue in a perfunctory manner. The court also blended its analysis of the right to privacy with its analysis of the psychotherapist-patient privilege, resulting in a holding that can be interpreted in at least three ways: (1) Root's post-crash psychiatric records are protected from the NTSB's subpoena by a psychotherapist-patient privilege at federal common law; (2) the records are protected by Root's constitutional right to privacy; or (3) the records are protected by a psychotherapist-patient privilege flowing from Root's constitutional right to privacy.

At least with regard to the portion of the holding based upon the constitutional right to privacy, this comment advances the following analysis as more closely approaching that mandated by the Supreme Court's privacy decisions. First, a court should acknowledge that the Supreme Court has recognized at least two types of privacy interests ostensibly protected by the constitution, an informational privacy interest and an autonomical privacy interest. Protection of the autonomical interest, an individual's liberty to make certain types of important decisions, has been restricted to only a few contexts, such as family relationships, marriage, and procreation. Only when this interest is implicated has the Court resorted to the strict scrutiny ("compelling state interest") standard of review. When the informational privacy interest, an individual's interest in precluding the government from disclosing private, personal matters, is asserted, the Court has used the deferential, rational relation standard of review, requiring

²⁰⁰ 735 F. Supp. 423 (S.D. Fla. 1990), *appeal dismissed*, 933 F.2d 1021 (11th Cir. 1991). See *supra* notes 1-13, 120-29, and 193-97 and accompanying text.

only that the government maintain a legitimate interest that outweighs the privacy interest. In the NTSB context, where a pilot is asserting that his psychotherapeutical records are protected by the constitutional right to privacy, a court should immediately recognize that the informational privacy interest has been asserted and that the balancing test is applicable. The approach taken by the *Hollywood Memorial Hospital* court conforms with the analysis to this point.²⁰¹

A court should next describe the factors considered crucial to the balancing equation. The court in *Westinghouse* compiled an impressive list of factors to consider when performing the balancing test.²⁰² Applying these factors to the facts of *Hollywood Memorial Hospital* is an interesting exercise. The type of record requested by the NTSB was a psychiatric record. A court should also consider the harm to Root that would result from a nonconsensual disclosure of the information as well as the injury to the psychotherapist-patient relationship. A court should take practical notice of the press accounts of the numerous criminal charges lodged against Root as well as the fact that Root had presumably never even met the psychotherapist until after the crash and the slim likelihood of a continued relationship with a psychotherapist in Hollywood, Florida since Root lived in the Washington, D.C. area. A court should not overlook the safeguards utilized by the NTSB to prevent unauthorized disclosure, particularly since the NTSB is subject to the Privacy Act of 1974.²⁰³ Finally, a court should note that NTSB is under an express statutory mandate to investigate *all* air accidents in order to determine probable cause of the accident. The public policy behind the creation of the NTSB,

²⁰¹ 735 F. Supp. at 424. "The constitutional right to privacy extends to the individual interest in avoiding the disclosure of personal matters, and medical or psychiatric records fall within that sphere. Again, the privacy right must be balanced against legitimate state interests in order to protect the communications, etc." *Id.* (citations omitted).

²⁰² See *supra* notes 186-89 and accompanying text.

²⁰³ See *supra* notes 57-70 and accompanying text.

including the promotion of air safety, manifests the public interest militating toward access. This comment suggests that a court carefully analyzing these factors is likely to hold that the NTSB has asserted a legitimate state interest that outweighed Root's diminished privacy interest. Regardless of the conclusion that a court reaches, a court owes an obligation to at least express the factors that it considered, unlike the court in *Hollywood Memorial Hospital*.

V. CONCLUSION

In the course of an NTSB air accident investigation, the NTSB's request for documents occasionally includes the psychotherapeutical records of the flight crew, particularly the pilot. In such a case, the pilot might refuse to relinquish the records on the grounds that the records are protected by a psychotherapist-patient privilege or the constitutional right to privacy. This comment has demonstrated that most courts have refused to recognize a federal psychotherapist-patient privilege. The right to privacy implicated here is the informational right to privacy. Regardless of whether a court recognizes that the privilege exists or that a pilot's right to privacy is properly asserted, the court determining whether to enforce the NTSB's administrative subpoena is likely to apply the same balancing test: whether the NTSB has asserted a legitimate governmental interest that outweighs the individual's right to privacy or the psychotherapist-patient privilege. Although application of the balancing test will differ depending upon the actual facts, many factors militate in favor of the NTSB's legitimate interest in investigating air accidents.